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ABSTRACT

In the public eye, three major investigations by the Federal Communications Commission (FCC) into the dominance of the broadcast networks have appeared as battles between opposing forces with lively conflicts as the FCC combats monopolistic power in the name of public interest. In spite of the past investigations and the resulting regulations, however, broadcasting is still overwhelmingly dominated by a handful of large corporations whose policies are the most important determinants of broadcast structure and content. FCC policy has done little to alter this situation and in many cases has helped further it. Hence, the image projected by the investigations serves only to mask a cooperative relationship between the broadcast networks and the FCC. A survey of the history of the investigations shows that this process is made possible by the mythology of the marketplace, which presupposes competition in broadcasting without allowing for exploration of the possibility that marketplace economics are an inadequate framework for understanding broadcast structure. In this light, the deregulatory bent of the investigation completed in 1980, appears not as a departure from the approach of its predecessors, but a continuation of it. (Author)

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Network Broadcasting and the Myth of Competition: A Review of the FCC's Investigations of Network Dominance

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NETWORK BROADCASTING AND THE MYTH OF COMPETITION: A REVIEW OF THE FCC's INVESTIGATIONS OF NETWORK DOMINANCE[1]

According to Murray Edelman,

> Administrative agencies are to be understood as economic and political instruments of the parties they regulate and benefit, not of a reified 'society,' 'general will,' or 'public interest.' At the same time they perform an equally important expressive function for the polity as a whole: to create and sustain an impression that induces acquiescence of the public in the face of private tactics that might otherwise be expected to produce resentment, protest, and resistance.[2]

The history of the FCC's network investigations clearly supports Edelman's description of the role of regulatory agencies. In the public eye, these investigations have appeared as battles between opposing forces, where the Commission combats monopolistic power in the name of the public interest while "special interests"--usually the networks--complain bitterly about the FCC's "aggressive" actions. In spite of the investigations and the resulting regulations, however, broadcasting is still overwhelmingly dominated by a handful of large corporations whose policies are the most important determinants of broadcast structure and content. FCC policy has at best done nothing to alter this general situation and in many cases has helped further it. Hence, the antagonistic image projected by the investigations serves only to mask a cooperative relationship between the networks and the FCC.

This cooperative relationship is not necessarily the product of the conscious intentions of either the FCC or the networks. The interests of both parties are united, not by their specific intentions, but by the general terms under which the debate has been conducted, the terms of economic liberatarianism.

The dominant guiding assumption in the FCC's network investigations has always been the belief that economic competition offers the best route towards a broadcast system that serves the interests of the American people. On the one hand, the question of competition provides an arena for what appears to be lively conflict between the regulators and the regulatees. On the other, the shared assumption that competition is both possible and desirable successfully precludes consideration of anything but a commercial system. The real questions, whether competition in broadcasting is possible and whether the dominance of private ownership actually serves our needs, go unasked.

The 1941 Report on Chain Broadcasting

The first major investigation of the networks, released in 1941, was born in Congressional concern over monopolies in radio during the 30's. In 1938, the total number of radio stations was no larger than it had been shortly after the beginning of broadcasting in 1927. The percentage of existing stations affiliated with major networks, however, had climbed to 52%, up from 32% in 1934.[3] Moreover, all but two of the thirty very profitable high-power broadcast stations in the country were owned by either NBC or CBS, and about half of the industry's net income went to the networks and their 23 controlled stations, leaving the other half to be divided among 637 independent and affiliated radio stations.[4]

Congress, after legislatively directing the FCC to investigate AT&T, had hinted that it might do the same for network broadcasting. Responding to this pressure from its funding source, as well as complaints from the major radio networks' competitors, the Commission voluntarily initiated an investigation of "chain broadcasting" in 1938. In effect, the FCC had been handed the task of responding to discontent with the network monopoly of radio.[5]

The FCC response was a long series of hearings accompanied by extensive research into the effects of network operations on the broadcasting industry. In 1939, the inquiry was given extra momentum by the appointment of the aggressive Chairman Fly to the Commission. The resulting report, released in 1941, confirmed the popular suspicion of the networks' power. "Efforts of CBS and NBC to maintain their dominant position," the report stated, "restrict the flow of programs from producers and listeners."[6]

The 1941 Report's analysis began with the assumption that it is the duty of the FCC to ensure the health of free competition in broadcasting. "Competition for advertisers," the report reasoned, "which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting."[7] To preserve the free market, the report recommended regulations prohibiting the networks from engaging in specific "practices or agreements in restraint of trade or furtherance of monopoly," such as restrictive contracts between networks and their affiliates and the exclusive network monopolization of markets in certain areas.[8]

There was some debate over whether competition was in fact a possibility in network broadcasting. In a dissenting minority opinion appended to the 1941 Report, two FCC commissioners argued that "[t]here is no open market condition in the business of broadcasting... Nature has determined that."[9] NBC, in arguing against the proposed regulations, similarly argued that physical limitations in radio networking made open market competition an impossibility.[10] No amount of regulations, it was claimed, could change that basic fact.

Some evidence at the time suggested that, in fact, network practices, not the nature of broadcasting, prevented competition in the industry. The Report revealed that, by means of one-sided, long term affiliation contracts, territorial exclusivity contracts, "option time" requirements, and network control over affiliates' advertising rates, the major networks had deliberately sought to prevent any would-be challengers from entering the market. Moreover, NBC's ownership of two networks (The "Red" and the "Blue") allowed it to thoroughly monopolize the airwaves in some areas. The networks' claim that these practices were not anti-competitive but simply necessary for business was belied by the history of the enactment of the practices, which showed that they were instituted as defenses against competition.[11] In light of this evidence, the Commission released with the Report a set of proposed regulations designed to prohibit these practices. Among these rules was one barring the ownership of more than one network, a provision directed particularly at NBC.[12]

The network reaction was vociferous. CBS claimed that the regulations would "cripple, if ... not paralyze, broadcasting as a national service".[13] NBC agreed. Fears were expressed that the entire industry structure would collapse. The networks took the FCC to court, and a legal battle lasting two years ensued, resulting in a Supreme Court ruling in favor of the Commission.

The 1941 regulations had less effect than either side had predicted. While they did force the divestment of a number of stations in duopoly markets and of NBC's second network, in the end the networks were neither "crippled" nor challenged by fresh competition. The percentage of stations that were affiliated with the networks, at 61% the year of the Report, continued to climb after the regulations, reaching a high point of 97% in 1947.

The only change was that, where previously three organizations reigned over the continuing trend towards concentration in broadcasting,—NBC, CBS, and Mutual—now, with the addition of ABC operating the old "Blue", there were four.

This first investigation, by far the most activist of the three, was also based on the broadest, most defensible analysis. Until 1941, no network regulation along these or other lines had ever been attempted. It was clear that the major networks were taking actions designed to limit competition, even if it wasn't clear that these actions were necessary to maintain the networks' dominance. Moreover, since the networks, although dominant, did not have complete control over radio, it is understandable that the authors of the 1941 Report dismissed the opposition argument that there can be no competition in broadcasting. In the context of 1941, a plan to limit excess power by instituting measures that would restrict anti-competitive actions and decrease concentration was, if not the best solution, at least a justifiable regulatory experiment.

The Barrow Report

The next major network investigation, the Barrow Report of 1957, failed to take note of the results of the experiment. After the war, NBC, CBS, and ABC shifted their attention away from radio to television, and the FCC extended its network regulations unchanged to the new medium. A series of regulatory blunders and allocations limitations, principally through the FCC's "freeze" of 1948-1952 and its Sixth Report and order in 1952, all coupled with the high cost of television programming, resulted in a limited, rigid TV broadcast structure which heavily favored nationally centralized production and distribution of programs and which made entry of competing networks virtually impossible. The result was that American television was not simply dominated,

but virtually under the complete control of NBC, CBS, and ABC. By the mid-1950's network profits were soaring.[14]

Like the 1941 Report, the Barrow Report was born in a combination of Congressional concerns and complaints from the major networks' struggling competitors.[15] Also like the 1941 Report, the network investigation of the 1950's presupposed the possibility of competition in nationwide broadcasting, and set for itself the goal of determining the extent to which industry practices inhibited that competition. Again, the study staff was given a list of relations and practices to explore, most of which had appeared in the 1941 Report, and all of which involved willful practices on the part of industry members.

The Barrow Report is several times longer, more detailed, and more timid than its 1941 predecessor. While the 1941 Report was willing to seriously address the effect of heavy industry concentration to the point of forcing the divestiture of NBC's Blue network and the sale of a number of network stations, the Barrow Report accepted as given the even heavier concentration which existed in television in the 1950's. While acknowledging that the UHF-VHF allocations problem was probably the most significant cause of undue network concentration, the Barrow Report explained that "it has been handled by the Commission outside the scope of this network study," and was therefore not addressed.[16] Another major cause of network concentration was simply dismissed without explanation: "There are probably certain economies of large scale operation in networking which the Network Study Staff has not explored."[17] Those structural factors which placed the networks in a privileged non-competitive position, therefore, while clearly the principle causes of undue network power, were simply ignored by the Barrow Report. Committed to its presupposition of a competitive broadcast industry, the Report ignored the evidence which clearly challenged that presupposition.[18]

The glue which held this illusion of possible competition together was the ideology of "localism." The Barrow Report claimed that it is in the public interest to pursue "a policy of seeking to achieve for stations the character of local institutions with a 'grassroots' interest in the service and program needs of the community." The value of this policy is that it allows for "a diversity of viewpoints and program services and a forum for community civic activities."[19] In other words, TV stations were envisioned as a sort of modern substitute for the village green. National network broadcasting, from this perspective, took on the image of an intruder into the community's independence and harmony. Noting the contrast between the overwhelmingly national and network dominated character of the television industry and the localist vision of community television, the Barrow Report concluded that, "the community institution concept has been seriously eroded."[20] The solution to this problem was to be found in business pluralism, that is, a policy of encouraging competition and diversity of ownership among local stations. A "grassroots interest in the community," therefore, was interpreted purely in terms of business and ownership control.[21]

In the context of television in the 1950's, where the higher cost of production and the allocations problems assured the networks uncontested dominance, and where the 1943 rules could be recognized as ineffectual, the presupposition of competition was much less defensible than it was in 1941. The Barrow investigation's attempt to limit specific competition-restricting practices in the industry was in essence an attempt to create competition where the nature of the situation insured that there was none. Perhaps this was all that could be expected given the general social-political climate of the fifties, but the inability of the resulting rules to alter the fact of network dominance is hardly surprising.

The percentage of network owned and affiliated television stations remained about 90% for nearly a decade after the Barrow investigation.[22] Local ownership of stations, of such importance to the Report's thinking, continued to decrease, dropping from 28.8% in the top 25 markets in 1956 to 23.9% in 1966.[23] In 1965, a decade after the Barrow investigation began, another FCC report was forced to conclude that things were basically unchanged. "The three network corporations," the report stated, "not only in large measure determine what the American people may see and hear during the hours when most Americans view television, but also would appear to have unnecessarily and unduly foreclosed access to other sources of programs."[24]

Analysis

The investigations and the regulations they produced caused neither the changes desired by the FCC nor the catastrophes envisioned by the networks. After both the 1941 and '57 Reports, the major networks continued to dominate the airwaves. No new networks emerged, and the level of competition did not change substantially. The networks' vastly superior production capabilities ensured that the affiliates would remain dependent on the networks for programming regardless of the contractual arrangements between the two. This economic dependence, in turn, ensured that the networks would be the primary force in determining the character of broadcasting in the country. Therefore, provided one assumes that the investigations should have corrected the situation which inspired them--the inordinate power of the networks--the '41 and '57 Reports were wholly ineffectual.

In another sense, however, the network inquiries were a success. In 1938, a polity ill at ease about the centralized power of the networks had made their fears known to the legislature, who then assigned the FCC the task of addressing those fears. The FCC, in turn, produced the satisfying spectacle

of a successful challenge to the networks, complete with an aggressive Commission Chairman, public tribunals, and condemnations of the self-serving actions of wealthy and powerful business executives. The loud complaints and struggles of the networks only served to reinforce the image of an antagonistic confrontation between the networks and the public as represented by the FCC. In the fifties, the Barrow investigation repeated the same scenario, although with less fanfare from both sides. The network inquiries, therefore, fulfilled exactly those functions Edelman expects of administrative agencies: providing public dramas that serve to allay the fears of the suspicious public, while continuing to further the interests of the parties being regulated, the broadcast networks.

It could be argued that this is an overstatement of the case; to claim that the inquiries were mere deceptive ploys, designed to take the heat off the networks while they continued to manipulate the FCC towards their own ends, is to simplify a complicated situation. After all, the first investigation did force the separation of ABC from NBC. The rule changes, although not substantially altering the structure of broadcasting, did take steps to prevent the networks from exercising excessive power over their outlets, and the nation is better off for these events. The FCC, in this view, is not simply bending to the whims of the networks, but is serving to strike a balance, to create as much diversity and competition as possible given the economic imperatives of the industry.

This less cynical view of the role of the FCC has its appeals, but it can be supported only by limiting one's vision to the few areas where conflict between the FCC and the networks has occurred. If the perspective is expanded, however, to take in also those issues <u>not</u> dealt with by the FCC, then the characterization of the FCC as a servant of the broadcasting industry becomes hard to refute. From the passage of the 1927 Radio Act onwards, for example,

the FCC has refused to actively question the fundamentally commercial, profit-making basis of broadcasting (except for the unheeded recommendation for studying the question in the Blue Book.) In spite of widespread interest in various forms of non-profit broadcasting, in spite of frequent complaints about commercial advertising in broadcasting, the FCC has refused to ever broach the issue of commercialism in any serious way. Since the popular sentiments against the commercial nature of broadcasting are, if not universal, at least widespread, the FCC's silence on the issue belies any pretensions it may have for being a vehicle for allowing public input into the broadcasting system. The FCC, by its silence, has from the beginning served to uphold the interests of the networks by ensuring the corporate, profit-making structure of the broadcast system.

In light of the Commission's passive affirmation of the commercial nature of radio and tv, the subject matter and approach of the network inquiries takes on new meanings. Both the 1941 and '57 inquiries took competition to be the basis of their evaluations of the situation. The '41 Report explicitly states that its goals are the maintenance of competition in the public interest, in the spirit of the Sherman Act. In the Report, the operations of the networks are analyzed in terms of "markets" and three different markets are distinguished: advertiser-network, network-audience, and network-station. In 1941, it was the network-station market that was found to be particularly lacking in competition, and the resulting rules focus on preventing monopolistic practices in this area. The 1957 Report and recommendations also focused on the network-station relationship, but directed some attention to the advertiser-network market as well.

The belief that competition is crucial to broadcasting in the public interest necessarily implies an acceptance of a purely commercial,

profit-based broadcasting system. In making competition the central issue, therefore, the FCC's network inquiries have simply eliminated consideration of anything but a commercial system, thus reinforcing the corporate broadcaster's controlling position in broadcasting. Moreover, the questions of competition provide an arena for what seems to be lively conflict between the regulators and the regulatees, ensuring the FCC its expressive function.

In summary, the 1941 and 1957 network inquiries, while providing satisfying spectacles for those wary of network power, in fact merely reaffirmed the networks' status in the broadcast system. By focusing on questions of a mythical competition, the investigations provided an arena for ritualistic conflict which successfully avoided any treatment of the basic commercial structure. The source of the problems which gave rise to the inquiries in the first place--the centralized profit-making structure of the broadcast system--was left untouched.

The 1960's

Throughout the sixties and into the early seventies, the issue of network dominance was pursued by the FCC largely under the auspices of the in-house Office of Network Study. A complex series of hearings, rules and revisions eventually led to the adoption of the Prime Time Access Rule, the Financial Interest Rule, and the Syndication Rule in the early 1970's. Throughout these proceedings, the primary participants were various groups with financial interests in broadcasting: the advertisers, the independent producers, and the affiliates. These groups, by means of hearing appearances and lobbying. contributed almost all the arguments, objections, and counter-arguments regarding proposed rules, and in some cases suggested the rules themselves. The localist rhetoric continued, but the net result of the exclusive influence of competing financial interests on the proceedings was, as a recent

FCC review of the matter has said, "[t]he relative well-being of networks, stations, and syndicates became awkward surrogate measures for viewer satisfaction."[25] The phrase "network dominance" in this setting came largely to be used to refer to either a lack of competition or inequitable profit sharing, while the localist rhetoric became increasingly devoid of social content. In other words, the only interests being addressed by the hearings were those of the television industry, that is, the interests of the regulated. Meanwhile, all the trends associated with network dominance continued largely unabated.

The 1980 Final Report on New Television Networks

Like its predecessors, the most recent inquiry into network dominance was born in a mixture of Congressional concerns and complaints from industry members who were disgruntled by the networks' power. In 1976, Westinghouse Broadcasting, the fourth largest company in broadcasting, filed a petition to induce the FCC to take further action against the networks' power. Westinghouses five television stations ("Group W") stood to gain financially from increased access to network-controlled prime time for their syndicated programs, and were threatened by network plans to expand the evening news to an hour.[26] In keeping with the expressive function of regulatory proceedings, however, the petition neglected to mention Westinghouse's own financial self-interests, and instead invoked the "public interest," focusing on the negative effects of the networks on "local communities."[27]

In response to Westinghouse's petition, pressures from Congress, and perhaps also to the regulatory uncertainty surrounding the new technologies and the repeated failures of earlier rulemaking efforts, the FCC began another network investigation in June of 1978. Like the 1941 Report and the Barrow investigation, the recent inquiry worked from the assumption that the public

interest is best served by economic competition. The recent inquiry has also continued the trends established by Barrow; it produced more material than either of the previous investigations (3,750 pp.), is even less antagonistic towards the networks, and is even more hesitant about recommending strong regulations.[28] However, there is a significant--and to some, a surprising--difference between the most recent inquiry and its predecessors. The 1980 Report is very critical of past regulatory efforts and suggests that in many cases problems will be solved, not by more regulation, by elimination of current rules.

The general dissatisfaction with past regulatory efforts plays a central role in the most recent investigations's Final Report. Existing rules, the report concludes, "do nothing to promote competition."[29] This is because the primary determinants of network relations to affiliates and other industry members are not restrictive contracts or practices, but the economic efficiencies of networking. Since the cost of program reproduction and distribution are insignificant when compared to the high cost of production, and because sales of advertising time are greatly facilitated by the ability for simultaneous transmission through a nationwide network, a network dominated system of broadcasting is inevitable. In other words, the enormous bargaining power of the networks over their affiliates, the primary source of concern, is a product of what the networks are, not of what they do. This fact has been largely ignored by previous regulatory thinking. Hence, the long-standing assumption that restrictive network practices force affiliates to accept network programming forgets that affiliates tend to accept network programs simply because they are more profitable, regardless of whether or not the affiliates are contractually obligated to accept the programs. The Prime

Time Access Rule, for example, "ignores the fact that the programing incentives of the three affiliates are in general identical to those of the three networks."[30] Similarly, "the miminal impact of the rules on affiliate clearances is not surprising in light of the incentives both the networks and their affiliates have to maximize the joint profits from network exhibition and in light of the generally more profitable nature of network programs, attributable to the efficiencies of networking."[31] "The economic advantages of networking," observes the 1980 Report, "are simply too great to expect economic concentration to be reduced through restrictions on network conduct,"[32] From this perspective regulations such as the ban on option time and the Prime Time Acess Rule are therefore basically pointless.

Given the nature of networks, the only thing that can compete with the power of a network is another network. If the FCC wishes to increase competition in nationwide broadcasting, the Final Report reasons, it should encourage the creation of new networks. Past FCC actions, however, have prevented, rather than encouraged new network entry. The primary example of this (frequently cited in the report) is the Sixth Report and Order of 1952 which created the VHF-UHF allocations problem, giving the established networks an advantage which doomed from the start all efforts to form a fourth network. A similar frequently-cited example is the FCC's regulation of cable TV in the period 1965-1972 which effectively restrained the development of cable until the rules were changed during the mid-1970's.

Since regulatory efforts have been generally either ineffective or counterproductive, the 1980 Report concludes that for the most part, they should be eliminated in favor of the "systematic disciplining and eroding forces of competition."[33] In other words, since regulation doesn't work, deregulation will. The report sees no reason to extend network regulations to

new technologies, for example. It suggests that the networks should be allowed to have their own cable or other secondary networks. Furthermore, mergers such as the proposed ITT-ABC merger of the sixties should be left unopposed.[34] In general, the nature of television broadcasting should be shaped "by impersonal marketplace forces rather than by the desires of a centralized government agency."[35]

The FCC's latest inquiry into network dominance has been widely interpreted as representing a radical change in regulatory philosophy. Broadcasting, for example, reports that the current inquiry took a position 180 degrees from that of the previous FCC investigations into the networks. Rather than recommending still further ways to hobble the networks, Broadcasting writes, the inquiry staff found "that previous regulatory efforts at heading off the networks hadn't done so, and that similar efforts in the future were doomed to fail... [the inquiry co-directors] argued for an open marketplace that would rely on competition rather than regulation to achieve the greatest benefits to the listening and viewing publics."[36]

In light of the history and philosophy of the previous investigations, however, the latest inquiry appears much less radical than is commonly assumed. While the inquiry's Final Report is more critical of previous regulations than its predecessors, it still performs the same function: on the one hand, it presents a dramatic image of gallant regulators taking bold and brilliant steps to serve the public interest in the fact of violent opposition from self-serving special interests; on the other, it recommends actions that will serve to enhance the dominance of those very interests. Moreover, the mythology which supports this political slight of hand is still the same: the mythology of naturally occuring competition.

The Myth of Naturally Occuring Competition

From the beginning, the FCC network investigations have presupposed first, that the "impersonal market place forces"tend to encourage competition, and second, that this competition is in the best public interest. Each of these assumptions is questionable. Market place forces are at least as likely to lead to centralization and a lack of competition as they are to lead to diversification, and it is unclear that competition, even where it does exist, necessarily serves the variety of needs generally subsumed under the term "the public interest."

The 1980 Report supplies ample evidence which subverts the report's own faith in marketplace forces. The report goes to great lengths to demonstrate the unlikelihood of networks engaging in "monopolistic practices," but uses the term "monopoly" to refer only to deliberate, unfair practices such as price fixing which artifically set prices higher than they need be. Given the absence of such practices, in an unregulated market place the only factor determining success is presumably the quality of the product. Elsewhere, however, the report mentions the added "efficiency" engendered by a firm's expansion. In suggesting the viability of allowing the ownership of more than one network, for example, the report explains, "dual networking will only be undertaken as part of the competitive process of internal firm expansion and contraction that promotes network efficiency."[37] Regulation that robs consumers of the benefits of this efficiency is therefore counterproductive. A similar argument is used in defense of unregulated mergers and expansion among various branches of the broadcast industry. What is being vaguely referred to here is the obvious fact that size alone can leave a company at a competitive advantage, especially in a field like broadcasting with its very high production and low distribution costs. Because of this,

a large firm can out-compete a small firm without engaging in "monopolistic practices" and without producing better programs. In a situation like broadcasting, therefore, "impersonal marketplace forces" can often lead towards firm expansion, the elimination of smaller competitors, and hence more concentration and less competition. In this case the marketplace works against competition, not for it.

In broadcasting, still another factor which limits the possibility of competition is the fixed, limited nature of networking. While proclaiming the improvements in quality, diversity, and competitiveness in TV broadcasting that would be gained by the entry of new national TV networks, the 1980 Report makes use of a study by R. E. Park on the economics of new network entry. An examination of Park's study, however, does not make it seem likely that a highly diverse and competitive national broadcasting network market will ever be a reality. Even if there were enough individuals willing and able to invest the $121 to $243 million estimated necessary to overcome the initial fixed costs of starting a network, the national economy and the broadcast spectrum, Park concludes, allow for no more than six networks in an ideal situation, and no more than four in more realistic conditions.[38] The 1952 allocations, therefore, are only partly responsible for the limited number of networks. The Sixth Report and Order merely added a further limitation onto what was an already highly restricted situation.

Competition vs the Public Interest

The second assumption common to all three network investigations, that competition in the broadcast industry necessarily serves the public interest, can be challenged in several ways. The 1980 Report claims that "competition and diversity, working through powerful economic mechanisms, may compel

businesses to provide those services that consumers value most highly and to do so at the lowest possible cost." Competition, however, does not always get the consumers what they want. The 1980 Report itself acknowledges the phenomenon of "second choice viewing" (a phenomenon long recognized by broadcast network programmers as "least objectionable program" viewing), where networks aim for the more homogenous second choices and avoid the more diverse first choices in order to attract the largest audience possible. The report argues that this problem would be solved by the introduction of more networks and thus more viewer options, but it seems unlikely that one or two more networks would be willing to produce first choice viewing for small audiences when they could compete with the other networks for larger audiences with "second choice viewing." Moreover, simple reflection on TV programing cycles belies the assumption that competition and diversity go hand in hand. In competing with each other, the networks more often imitate each other's programs than they attempt to create something new and different.

Finally, the notion of competition applied to broadcasting invariably implies a fundamental confusion between the economic interests of the advertiser and the much more ephemeral (but legally, the more important) interests of the audience. The 1980 Report does this explicitly by equating the audience with the advertisers, indiscriminately using the word "consumer." to refer to both.[39] The confusion, however, is present in the previous reports as well. Of course, "audience interests" in broadcasting are elusive and hard to define, but the frequent and varied complaints about programing which have often helped fuel the regulatory fire (including the recent inquiry) are based on understandings of the public interest which are often in direct opposition to the interests of the advertisers.

The New Technologies

Unlike the Barrow Report and the preceedings of the Office of Network Study, the recent inquiry has not relied on localism to maintain its hope of competition in the face of the contradicting evidence of industry structure. The Final Report is in fact heavily critical of localism, largely for the reasons already mentioned. In place of localism, however, the Final Report has introduced a faith in new technologies. The multi-channel capabilities of cable and satellite technologies, it is argued, will open the door to numerous networks, more diverse and specialized programing, and a generally more satisfactory broadcast system. The restrictions inherent in the limited broadcast system have been overcome, finally making a truly competitive situation in broadcasting a possibility. Because the previous attempts at regulation have failed, the best approach to the new technologies is one of laissez-faire.

There are numerous reasons to be doubtful of the faith in new technologies. While the Final Report is fond of pointing to the early VHF-UHF allocations problems as an example of the inadequacy of regulations, it fails to take note of the fact that, to this day, large numbers of UHF broadcast frequencies across the country are unused. As Richard Posner has pointed out, this fact casts serious doubt on the belief that cable's multi-channel capacity will substantially alter industry structure.[40] Some argue that the unused UHF frequencies are the result of the added difficulties of transmitting and receiving in the UHF spectrum. The reception difficulties, however, have been largely eliminated by the introduction of click-stop UHF tuners, and the added cost of UHF transmission is relatively insignificant when compared to the costs of programming. Furthermore, McGowan, Noll, and Peck state that the cost of broadcasting over the air is approximately the same as

that of broadcasting over cable.[41] If, as seems to be the case, the reason for the large quantity of unused airspace is simply that the market is thin, and not that access is limited, then the hope that cable will introduce new levels of competition is a false one.

There are other reasons to be wary of new technologies. As one student of those developments points out, "Euphoria over what appears to be the end of scarcity theory as a basis for regulation takes little account of the fact that nearly all cable cities are one-company operations."[42] Further, although most new, large-city cable systems are being constructed with capacity for dozens of channels, fully two-thirds of the existing systems have only twelve channels or less. While the larger capacity larger market systems will eventually change the limited channel conditions, the long term industrial structure is being forged now in the current restricted environment. On a local level, therefore, cable companies may have even more potential for monopolistic control than did NBC when it was able to thoroughly dominate local markets with its Red and Blue networks. The potential effects of multiple ownership of such local monopolies has yet to be thoroughly explored.

Finally, regardless of whether or not competition will be a product of the new technologies, the dubious practice of equating economic with social concerns is still left unquestioned. Even though the distribution of ownership and profits within the industry might be shifted by the new technologies, the high cost of programming will inevitably generate centralizing tendencies. Moreover, the primary force behind programming and distribution decisions will be profits, and not the non-economic terms of the "public interest."

In summary, although the 1980 Report appears on the surface to differ substantially from its predecessors, it operates from the same confusion

attendant upon the contradictions of economic libertarian principles, as worked out in American broadcasting. Therefore, as far as broadcasting is concerned the outcome of the recent inquiry is most likely to resemble the outcome of the earlier investigations: network dominance will continue. Because open competition in broadcast networking will always seem to be an exception and not the rule and because economic interests do not necessarily coincide with audience interests, the FCC's recent investigation has once again circumvented the main issues.

Conclusion

The history of the FCC's network regulations clearly illustrates Edelman's characterization of regulatory agencies. The networks have grown ever more powerful and rich under such protective rulings as the 1952 regulations, and stand to grow even more so under the coming new wave of deregulation. Meanwhile, the FCC has conducted a series of investigations into "network dominance" complete with accusations of monopoly and wrongdoing, accompanied by protests from the industries. Together these theatrics serve to distract attention from the more important questions.

The economic libertarian faith in competition has played an important role in this diversionary theater. The fact that competition has always been the central issue has successfully eliminated consideration of anything but a commercial system, thus reinforcing the corporate broadcaster's controlling position in broadcasting. Moreover, the questions of competition provide an arena for what seems to be lively conflict between the regulators and the regulatees, ensuring the FCC an appearance of activism and opposition.

The recent network inquiry will probably have even less influence than its predecessors, its conclusions being more reflective of current trends towards deregulation than causative of those trends. The 1980 Report is

interesting, however, in that its castigation of network regulation in general suggests that the ideology of regulated competition, which has been so instrumental in supporting the private corporate structure in broadcasting, may have run its course. From the activist fervor of the 1941 Report to the 1980 Inquiry's passive anti-regulatory attitude, the belief that competition can be created or maintained through regulation has been going through a gradual decline. Each report has been less certain of itself than its predecessor, and has had to go to greater lengths to fit the facts of network broadcasting into the framework of libertarian economics. In describing the "market" of network broadcasting, for example, the 1941 Report was content with a single-sentence definition.[43] The Barrow Report, however, recognized that the task of defining the market was "exceedingly difficult" and devoted seven pages to the problem.[44] The 1980 Report devotes ten pages to the subject, and observes that the ultimate choice of definition is subjective and "may reflect an underlying policy judgment" depending upon the kind of regulation one wishes to promote.[45] This is just short of claiming that the "market" is more a product of regulatory and original Congressional policy intentions than a real phenomenon in broadcasting.

In a way, the current inquiry, in the face of a history of failed regulatory efforts, has been forced to come closer than ever before to the real question. "The issue of network dominance," observes the Final Report, "cannot be adequately explored without also considering the causes and consequences of the industry's economic structure."[46] Those conditions, of course, derive largely from a general American industrial environment that was well in place even before broadcasting emerged. The regulatory confusions over the years since have also been derivative of a similarly longstanding set of myths about the nature of American community, localism, economic

opportunity and competition. Therefore, the obvious next step--confronting the inevitable lack of competition in broadcasting, and the consequent contradiction inherent in a privately owned, collectively used, non-competitive system--is avoided by the continued insistence on such myths.

The 1980 Report strains under the weight of those myths. On the surface, in the context of contemporary political trends, it appears highly attractive and reasonable. At a deeper level of comparative historical analysis it begins to appear to be considerably more awkward, less consistent, and less convincing than either the fervent 1941 Report or the staid Barrow Report.

In 1925 Herbert Hoover, while presiding over the creation of the first broadcast regulation, confidently predicted that, if the industry were left to fend for itself, intrusive spot advertising would never become a reality because of the nature of open competition.[47] Since then, the history of broadcast regulation has been filled with countless examples of regulators hopefully relying on the market to serve the public, and then years later discovering that their hopes had been misguided. Nonetheless, most current public discourse about regulation accepts some version of economic libertarianism and proceeds to discuss the extent to which government should have a role in the market place--the familiar government vs. business arguments. The question of whether or not the market place is a good determinant of the public interest in the first place goes unasked.

In the conclusion to the 1941 Report, the authors wrote, "If the industry cannot go forward on a competitive basis... then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers."[48]

The authors of the 1941 Report were not yet ready to make that concession; the industry was young, and the regulatory premise of competition was untested. Now, however, forty years have gone by and the evidence is in. We have to concede, finally, that "broadcasting is not properly a competitive industry." Further, in spite of the hopeful rhetoric to the contrary, we must wonder whether the developing realities of the new technological environment can offer the sort of competitive conditions that do in fact lead to a diversity that is recognizable in qualitatively significant social terms.

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[1]I would like to thank Professor Willard D. Rowland for his extensive assistance in researching and revising this paper, and Eileen Meehan for her advice and encouragement.

[2]Murray Edelman, The Symbolic Uses of Politics, (Urbana: University of IL Press, 1964), p. 56.

[3]Christopher H. Sterling and John M. Kittross, Stay Tuned: A Concise History of American Broadcasting (Belmont, CA: Wadsworth, 1978), p. 512.

[4]Report on Chain Broadcasting, FCC, Docket 5060, May, 1941, p. 99.

[5]Pressure to initiate the hearings came from a variety of sources, but they followed what has by now become a predictable pattern. In Congress, the usually anti-monopolistic, progressive sentiments were aroused and often combined with a distaste and/or fear of the crass commercialism that had been increasingly shaping the character of radio programming during the 1930s. The Mutual Broadcast Network and Transcontinental Broadcasting System, CBS's and NBC's weak but principle competitors, also voiced loud complaints. Several attempts to force an investigation of the networks had been made in Congress. Congress also had voiced criticisms of the FCC for lack of action and for collusion with the industry; an investigation of the FCC by Congres thus appeared to be in the works. By early 1938 it was generally accepted that an investigation of the networks either by Congress or the FCC was inevitable.

[6]Report on Chain Broadcasting, p. 48.

[7]Ibid., p. 47.

[8]Report on Chain Broadcasting, p. 95.

[9]Ibid., p. 116.

[10]Ibid., p. 47.

[11]CBS instituted restrictive contracts from the beginning, but NBC's president could claim in 1931 that NBC "holds its network stations together only by the superiority of its network program service and by the demand of listeners for NBC programs." When Mutual entered the market, however, NBC quickly reversed its position and instituted its own set of restrictive network-affiliates contracts. Similarly, Mutual remained without contractual restraints only until 1940, when a fourth network tried to enter, the Transcontinental Broadcasting System. "The upshot of the whole business," concluded the 1941 Report, "is that today only a negligible proportion of the Nation's total night-time broadcasting wattage is free to bargain in the network-station market." (Report on Chain Broadcasting, p. 49.)

The proposed regulations included:

[12] 1) limitation of affiliation contracts to one year for both parties, 2) elimination of exclusivity requirements of affiliates, 3) elimination of option time, 4) elimination of restrictions on affiliates' abilities to reject network programs, 5) a prohibition on the networks' practice of setting station rates, 6) a ban on ownership of more than one network, and 7) a ban on the ownership of two or more stations in a service area by the same licensee.

[13] Sterling and Kittross, p. 190.

[14] From 1954 to 1957, advertising time sales grew by 65%, more than doubling the station number growth rate of 32%. (Bunce, p. 78). About 70% of these expanding time sales were accounted for by the networks. (Barrow Report, p. 610) There's no doubt that the networks prospered. In 1955, for example, CBS's flagship station WCBS recovered 2,290% on its total investment in broadcast property. (Bunce, p. 96).

[15] The Senate Commerce Committee investigated the restrictive nature of the 1952 allocations and commissioned special reports on the network situation, one by a former FCC staff member, the other by a former Commissioner. The FCC itself requested funds to investigate the networks for a number of years prior to 1955. Frequent allegations of monopoloy were made by affiliates and potential rival networks, especially the Dumont Television Network, whose significant attempt at forming a fourth network collapsed in 1955. (Broadcasting, Oct 7, 1957, p. 36.) Largely due to the efforts of the leading Senate Commerce Committee members concerned about network monopoloy, funds for a Commission Network Investigation were appropriated in June of 1955.

[16] Network Broadcasting: Report of the Network Study Staff to the Network Study Committee, FCC, presented to the Clmmittee on Interstate and Foreign Commerce, 85th Congress, 2nd Session, House Report 1297, 1958 (hereinafter referred to as the Barrow Report), p. 10.

[17] Ibid., p. 201.

[18] This blindness to the privilege inherent in the structure of network broadcasting was not a quirk of the Barrow Report's staff. The criticisms of things like option time, "must-buys", affiliation contracts, and multiple-station ownerships which predominated in the Report were prefigured in numerous public statements. Virtually identical criticisms were made in a report by Kenneth Cox, special counsel to the Senate Commerce Committee, and by the House Antitrust Subcommittee, headed by Rep. Emanuel Celler, earlier in 1957. The Barrow Report's criticisms of option time and must-buys also closely paralleled the statements made to the Senate Commerce Committee in March of 1956 by Richard A. Moore, president of a Los Angeles television station. The regulatory community as a whole, therefore, was maintaining its belief in a potentially competitive broadcast industry by avoiding the question of structure and focussing only on those areas where a lack of competition could be attributed to willful action. ("Variations on a Familiar Theme," Broadcasting, Oct. 7, 1957, p. 33.)

[19] Barrow Report, p. 6.

[20]Cited in Richard Bunce, Television in the Corporate Interest, (Praeger Publishers, 1976), p. 21.

[21]Members of the regulatory community in the FCC and Congress hailed the Barrow Report as an important step towards curbing the networks' monopolistic tendencies. The networks themselves, however, greeted the Report with conspicious silence. (Broadcasting, Oct. 14, 1957, p. 74.) Their silence was perhaps effective. The Report attracted less interest than its 1941 predecessor, and action on the Barrow Report's recommendation was slow and partial. The first actions were taken two years later, when the Commission banned network spot market representation of affiliates and forced the networks to make affiliates and forced the networks to make affiliation contracts public. The Commission rejected the recommended ban on option time, however, viewing option time as "necessary for successful network operation." (Not until 1963 did the FCC reverse itself on option time, outlawing the practice for good.) Debate on multiple ownership dragged on into the sixties. (Final Report, p. IV-6-IV-10.)

[22]Sterling and Kittross, p. 515.

[23]Bunce, p. 23.

[24]cited in "The Historical Evolution of the Commercial Network Broadcast System," FCC, Network Inquiry Special Staff, October, 1978, p. 126.

[25]Mary Catherine Kilday, "A Review of the Proceedings of the FCC Leading to the Adoption of the Prime Time Access Rule, The Financial Interest Rule, and the Syndication Rule," FCC, Network Inquiry Special Staff, October 1979, p. 59.

[26]In the previous decade, the networks' combined profits had increased 246% while their payments to affiliates, including Westinghouse stations, had remained virtually static. Moreover, the five stations were threatened with a revenue loss of $5 million and a profit loss of $4 million if the networks carried out their plans to expand the evening news to an hour at the expense of local prime-time programming. (Broadcasting, Sept. 6, 1976, p. 25.) Group W had become active producers of programming and had worked a process of syndication among themselves. With eased prime time access rules Group W could expect to develop a much larger syndication market for its wares. (This expectation was latter borne out in commercial success of "PM Magazine.")

[27]The petition claimed that the networks maintained unfair economic dominance over their affiliates, with the result that "[e]ach year local affiliated stations have less involvement in and responsibility for the totality of the programming carried over their facilities to the public in their communities." Moreover, the petition argued, the excess of crime, sex, and violence in network programming was partly the result of the lack of affiliate input into programming decisions; if affiliates were given plenty of time to clear network programs and a chance to provide some "grass roots reaction" to network decisions, the problem would be reduced. [Broadcasting, Sept. 6, 1976, pp. 24-25.)

[28]Broadcasting, Nov. 10, 1980, p. 38.

[29]New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report, FCC, Network Inquiry Special Staff, October, 1980, (Hereinafter referred to as Final Report) p. IV-47.

[30]Ibid., p. IV-82.

[31]Ibid., p. IV-47.

[32]Ibid., p. I-3.

[33]"Executive Summary," in Final Report, p. 26.

[34]This conclusion is particularly surprising because the Justice Department's reasons for opposing the merger were entirely consistent with the 1980 Report's premise: the DOJ felt that ITT was the most likely candidate for the formation of a fourth network, and that a merger with ABC would thus prevent the creation of a new network. (Final Report, p. III-51.)

[35]Ibid., p. I-29.

[36]Broadcasting, Nov. 10, 1980, p. 36.

[37]Final Report, p. III-84.

[38]Ibid., p. I-67. to I-70.

[39]Ibid., p. IV-29.

[40]Richard A. Posner, "The Appropriate Scope of Regulation in the Cable Television Industy, "Bell J. of Econ. and Management Sci. (Vol. 3, 1972) pp. 102-103.

[41]Cited on p. 103, Posner.

[42]T. Rimmer, "Videotex and Teletext: Regulation of the Electronic Publisher?" Paper presented to the Mass. Comm. Division, ICA Annual Convention, Minneapolis, May, 1981.

[43]Report on Chain Broadcasting, p. 148.

[44]Barrow Report, pp. 170-176.

[45]Final Report, pp. III-37 to III-47, especially III-41.

[46]"Executive Summary" in Final Report, p. 1.

[47]Herbert Hoover's Address to the Fourth Radio Conference.

[48]Report on Chain Broadcasting, p. 89.

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